

ATTACHMENT B

Staff Argument

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Kenneth Graves (Respondent) was employed by Fruitvale Elementary School District (Respondent District) as a Lead Custodian. By virtue of his employment, Respondent was a local miscellaneous member of CalPERS. On February 4, 2021, Respondent submitted an application for disability retirement on the basis of an orthopedic (left hand, psoriatic arthritis and osteoarthritis) condition. Respondent's application was approved by CalPERS, and he retired effective June 5, 2021.

To remain eligible for disability retirement, competent medical evidence must demonstrate that the individual remains substantially incapacitated from performing the usual and customary duties of his position. The injury or condition which is the basis of the claimed disability must be permanent or of an extended duration which is expected to last at least 12 consecutive months or will result in death.

By letter dated June 2, 2022, CalPERS notified Respondent that CalPERS was conducting a review of his eligibility to continue to receive disability retirement benefits. Respondent was referred to board-certified orthopedic surgeon, Don Williams, M.D., for an Independent Medical Evaluation (IME). Dr. Williams interviewed Respondent, reviewed his work history and job descriptions, obtained a history of his past and present complaints, and reviewed his medical records. Dr. Williams also performed a comprehensive IME. Dr. Williams concluded that Respondent was not substantially incapacitated from the performance of his job duties as a Lead Custodian for Respondent District.

After reviewing all of the medical documentation and the IME reports, CalPERS determined that Respondent was no longer substantially incapacitated, was no longer eligible for disability retirement, and should therefore be reinstated to his former position as a Lead Custodian.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on November 13, 2023. Respondent and Respondent Kern County Schools (Respondent Superintendent) were each represented by separate counsel at the hearing. Kim Carlson, Assistant Superintendent, was present on behalf of Respondent District.

At the hearing, Dr. Williams testified in a manner consistent with his examination of Respondent and the report prepared after the IME. Dr. Williams diagnosed Respondent with the following conditions: (1) psoriatic arthritis controlled by injections; (2) degenerative osteoarthritis base of the left thumb at the carpometacarpal joint; and (3) mild dorsal joint skin psoriasis. Dr. Williams opined Respondent maintained full motion of his hands and fingers, but noted a slight loss of motion in Respondent's left thumb. Dr. Williams felt Respondent exaggerated his complaints and exhibited poor effort during the grip strength test on his left hand. He testified there is no reason for arthritis in Respondent's thumb to affect grip strength because the test involves the palm and other fingers, not the thumb. Dr. Williams believes that Respondent is able

to perform all the duties of his position and he is therefore no longer substantially incapacitated.

Respondent testified that he had difficulty using his left hand to perform his job duties for about four years before he applied for disability retirement. He used braces, splints, injections, anti-inflammatory pills and topical medications to control his symptoms, none of which worked. His left hand hurts constantly, and he avoids any activities that require the use of two hands. Respondent testified he has trouble with everyday tasks, such as picking up objects and cleaning. Respondent cannot lift heavy objects like large trash bags or desks because his left hand is too weak. Respondent is concerned that he would cause further injury if he returned to work. Respondent disagreed with the results of Dr. Williams's examination and IME report.

Respondent called his treating physician, board-certified Internist Emmanuel Strategus, M.D., to testify at the hearing. Dr. Strategus has treated Respondent for various conditions since 2011. Dr. Strategus agreed with Dr. Williams that Respondent suffers from psoriatic arthritis and osteoarthritis of the hands. However, Dr. Strategus found Respondent to be substantially incapacitated from performing his usual job duties due to these conditions. Specifically, Dr. Strategus stated Respondent could not do any pushing, pulling, or lifting. Dr. Strategus described Respondent's left thumb joint as having an "obvious deformity." He noted any task requiring Respondent to use two hands repetitively, such as sweeping and mopping, would be difficult and cause pain. Dr. Strategus' opinion was corroborated by objective findings of swelling and X-rays showing degeneration in Respondent's left thumb.

Respondent also called Kim Carlson, Assistant Superintendent for Respondent District. Ms. Carlson testified that Respondent attempted to perform his job duties as Lead Custodian but struggled due to pain. She noted that he had difficulty opening and closing campus gates, cleaning bathrooms with mops, and vacuuming.

After considering all of the evidence introduced as well as arguments by the parties at the hearing, the ALJ granted Respondent's appeal. The ALJ found that CalPERS has the burden of proof and failed to meet its burden by a preponderance of the evidence. The ALJ found that both doctors agreed Respondent suffers from psoriatic arthritis and degenerative osteoarthritis and that both conditions cause Respondent pain. The ALJ found Dr. Strategus' testimony more persuasive. The ALJ also found Respondent's complaints of severe pain to be credible and supported by the evidence. The ALJ found that Respondent's condition would prevent him from performing key duties of a Lead Custodian such as mopping, sweeping, moving furniture, lifting heavy objects, and working on a ladder. The ALJ found no evidence that Respondent's condition had improved since CalPERS initially approved his disability retirement.

For all the above reasons, staff argues that the Proposed Decision should be adopted by the Board.

January 16, 2024

Bryan Delgado
Attorney